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No. 06-306

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MARIANNE SAWICKI,
Petitioner,

v.

MORGAN STATE UNIVERSITY
and STATE OF MARYLAND,
Respondents.

On Petition For A Writ Of Certiorari
To the United States Court Of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

STEVEN M. SULLIVAN*
MAUREEN WALSH DAVID
Assistant Attorneys General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6324

Attorneys for Respondents

**Counsel of Record*

H. Res. 547

In the House of Representatives, U.S.,
November 16, 2005.

Whereas the Palmdale School District sent parents of elementary school students at Mesquite Elementary School in Palmdale, California a letter requesting consent to give a psychological assessment questionnaire to their first, third, and fifth grade students;

Whereas without the informed consent of their parents, the young students were instead administered a questionnaire that contained sexually explicit and developmentally inappropriate questions;

Whereas seven parents subsequently filed a complaint against the Palmdale School District in a Federal district court;

Whereas on November 2, 2005, a 3-judge panel of the Ninth Circuit Court of Appeals affirmed the decision of the United States District Court for the Central District of California in the case (Fields v. Palmdale School District) and held that parents "have no constitutional right . . . to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so";

Whereas the Ninth Circuit stated, "once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished";

Whereas in Meyer v. Nebraska, 262 U.S. 390, 401 (1923), the Supreme Court recognized that the liberty guaranteed by the 14th amendment to the Constitution encompasses "the power of parents to control the education of their [children]".

Whereas the Supreme Court in Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925), highlighted the Meyer doctrine that parents and guardians have the liberty "to direct the upbringing and education of children under control" and emphasized that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations";

Whereas in Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972), the Supreme Court acknowledged that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. . . . The duty to prepare the child for 'additional obligations', referred to by the Court [in Pierce] must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship";

Whereas a plurality of the Supreme Court has stated, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children" (Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion));

Whereas the Ninth Circuit's decision in Fields v. Palmdale School District presupposes that "parents make the choice as to which school their children will attend" when, in fact, many parents do not have such a choice;

Whereas the decision in Fields establishes a dangerous precedent for limiting parental involvement in the public education of their children; and

Whereas the rights of parents ought to be strengthened whenever possible as they are the cornerstone of American society: Now, therefore, be it

Resolved, That it is the sense of the House of Representatives that –

(1) the fundamental right of parents to direct the education of their children is firmly grounded in the Nation's Constitution and traditions;

(2) the Ninth Circuit's ruling in Fields v. Palmdale School District undermines the fundamental right of parents to direct the upbringing of their children; and

(3) the United States Court of Appeals for the Ninth Circuit should agree to rehear the case en banc in order to reverse this constitutionally infirm ruling.

Attest:

Clerk:

QUESTION PRESENTED

Did the court of appeals correctly affirm the district court's entry of summary judgment denying a white female professor's Title VII race and gender discrimination claims arising from denial of tenure where undisputed facts in the record showed that in her seven-member department whites outnumbered blacks 5 to 2 and the male-female ratio was 4:3; that the plaintiff did not get along with her department colleagues or her students regardless of their race or gender; that not one of the many faculty members who reviewed her application at various stages recommended her for tenure; that an applicant of her same race and gender was granted tenure not long after the plaintiff's application was denied; and that statistically applicants for tenure and promotion at the defendant university fared comparably irrespective of race or gender?

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STATEMENT OF THE CASE

Petitioner Marianne Sawicki, a female Caucasian, is a former associate professor in the Department of Philosophy and Religious Studies at Morgan State University. App. 2a. Her three-year contract of employment began in 2000 and expired on June 30, 2003, after she was denied tenure in June 2002. App. 3a. As the district court found from undisputed facts and the court of appeals affirmed, in her short time at the University, Ms. Sawicki had "a 'major confrontation'" with students who "were male and female, white and black," App. 4a, 5a n.1, and she was "the subject of a petition drive by 14 of her students" seeking to have her investigated "for perpetuating 'an inhospitable academic environment,'" App. 6a. Ms. Sawicki "did not get along with her department colleagues, irrespective of race and gender, and did not have a single reviewer recommend her for tenure." App. 31a. "The President, VPAA [Vice President for Academic Affairs], Dean, and Chair who all agreed that Plaintiff should not have been tenured in 2002 are the same individuals who all agreed that she should have been hired in 2000." App. 10a.

When her application for tenure was denied in 2002, Ms. Sawicki was offered but did not accept the opportunity to defer the tenure decision and reapply the following academic year. App. 8a. Instead, she pursued an administrative appeal of the tenure denial. App. 8a. *See also* District Court's March 15, 2004 Memorandum Opinion partially granting defendants' motion to dismiss, reproduced in Respondent's Appendix ("R. App.") at R. App. 16. Since Ms. Sawicki did not accept the offered deferral of tenure, her employment at the University ended when her administrative appeal was denied and her contract expired in June 2003. App. 9a; R. App. 16.

Ms. Sawicki subsequently filed a complaint in the

United States District Court for the District of Maryland alleging that the denial of tenure and the expiration of her contract of employment at the University resulted not from her well-documented lack of rapport with students and faculty members irrespective of their race or gender, but from race and gender discrimination on the part of the Chair of her department and others at the University. App. 10a-11a.

However, as both courts below determined, the extensive record developed in this case does not support an inference that Ms. Sawicki was a victim of race or gender discrimination. In her seven-member department, whites outnumbered blacks 5 to 2 and the male-female ratio was as equal as possible at 4:3. App. 9a. Comprehensive personnel records showed that in the period between 1999 and 2005, applicants for tenure and promotion at the University "fared comparably across racial and gender lines." App. 26a. Another white woman in Ms. Sawicki's department applied for and was granted tenure in 2003, the year Ms. Sawicki's contract ended. App. 26a.

By contrast, Ms. Sawicki's application for tenure met with the unanimous disapproval of all who considered it, regardless of their race or gender. App. 7a. The established tenure process was multi-level and campus-wide, including recommendations from the Chair of the department, a departmental review committee, a school-wide committee, the Dean of the College of Liberal Arts, and the Vice President of Academic Affairs ("VPAA"). App. 7a-8a. As required by statute, the President makes the final decision as to whether to grant tenure. *See* Md. Code Ann., Educ. §14-104(j)(4)(iv).

Not one of the many individuals charged with

reviewing and making tenure recommendations voted to grant Ms. Sawicki tenure in 2002. App. 7a. As the district court found from undisputed evidence, "evaluations at every stage of the tenure review process reflected concerns about her teaching and her fractured relationships with many of her students as well as her problems relating to her colleagues." App. 7a. The departmental committee, the campus-wide committee, and the Chair all recommended denial of tenure. App. 7a. After conducting his own review, the Dean recommended that Ms. Sawicki's application for tenure be deferred for one year, and the VPAA concurred. App. 7a, 8a. The President agreed and sent Ms. Sawicki a letter, dated June 28, 2002, containing "an unambiguous offer of a deferral if it was accepted by Sawicki within 10 days." R. App. 16. *See also* App. 8a, 9a. "The letter further stated that not accepting the terms of the offer would result in a determination that Sawicki had not met the criteria for tenure and that her employment would terminate on June 30, 2003." R. App. 16. *See* App. 8a. As the district court determined, "[r]egardless of Plaintiff's beliefs as to what she was doing," the "facts in the record and law of the case show that she did not accept the deferral offer" within the required time period. App. 9a.

Instead, Ms. Sawicki lodged an administrative appeal of the tenure denial. App. 8a. A Faculty Appeals Committee was convened, heard the appeal and determined that there was no procedural error or violation of tenure process policies. App. 9a. The President notified Ms. Sawicki that her appeal was denied and that her employment would terminate accordingly at the end of her contract, on June 30, 2003. App. 9a.

Ms. Sawicki bases her Title VII claim on allegations that the University's decisionmakers, up to

and including the President, engaged in "racial politics" and had an anti-female bias, resulting in the denial of her tenure application. App. 10a-11a. As examples of alleged discrimination, she points to various actions on the part of the Chair and, to some extent, the Dean, the VPAA and the President. App. 10a-11a.

The district court rejected these arguments in an unpublished memorandum opinion, App. 3a-40a, in which the court considered the Title VII claim under both the mixed motive analysis set forth in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), and the single motive analysis of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), *see* App. 22a, as well as pertinent Fourth Circuit authority, *see* 14a, 17a, 23a (citing *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 286 (4th Cir. 2004)(en banc), *cert. dismissed*, 543 U.S. 1132 (2005); *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 n.5 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1033 (2006); *Jimenez v. Mary Washington College*, 57 F.3d 369, 377 (4th Cir. 1995)). The district court concluded that in light of "undisputed weaknesses in Plaintiff's candidacy" for tenure, App. 31a-32a, "no reasonable juror could find that the circumstances surrounding Plaintiff's tenure denial amount to unlawful discrimination or otherwise conclude that discrimination played a role in the tenure denial," App. 24a. The district court further determined that Ms. Sawicki "has not created a triable issue" on whether the University's decisionmakers "acted with unlawful discriminatory animus when they denied her tenure application and offered her a deferral." App. 32a.

Finding no liability on the part of the University, the district court granted summary judgment on the Title VII claim as to denial of tenure. App. 32a. The district

court also granted summary judgment for defendants on Ms. Sawicki's Title VII sexual harassment and hostile environment claims and her discrimination claims under 42 U.S.C. § 1983. App. 33a-34a, 39a. Earlier in the litigation, the district court had granted defendants' motion to dismiss various other claims under federal and state law, including a retaliation claim. R. App. 1-17. The petition pending before this Court does not seek review of the district court's rulings denying Ms. Sawicki's claim of sexual harassment and hostile environment, her § 1983 discrimination claim, her retaliation claim, or any of her other claims that were dismissed by the district court.

In a two-page, unpublished per curiam decision, the court of appeals affirmed on the reasoning of the district court. App. 1a-2a. Ms. Sawicki's petition for rehearing and rehearing en banc was denied. App. 41a.

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Further review of this case is unwarranted because the unpublished decisions below rest on a fact-specific determination that conforms with prior decisions of this Court and gives rise to no error that would justify the exercise of this Court's discretionary jurisdiction. Both courts below concluded from undisputed evidence in the record that "no reasonable juror could find that the circumstances surrounding Plaintiff's tenure denial amount to unlawful discrimination or otherwise conclude that discrimination played a role in the tenure denial." App. 24a. Whether the record is evaluated under the legal analysis applied by the district court and the court of

appeals, or under the alternative analyses in the decisions from other circuits cited in the petition, the undisputed facts do not permit a finding of unlawful employment discrimination. Accordingly, this case presents a poor vehicle for considering the legal question posed in the petition, since resolution of that issue is unlikely to alter the outcome of this case.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

STEVEN M. SULLIVAN
MAUREEN WALSH DAVID
Assistant Attorneys General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6324

Attorneys for Respondents

November 1, 2006

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARIANNE SAWICKI,	:	
v.	:	Civil Action:
	:	WMN-03-1600
MORGAN STATE UNIVERSITY, *et al.*	:	

MEMORANDUM

Before the Court is Defendants' Motion to Dismiss. Paper No, 19. The Motion has been fully briefed and is ripe for decision.[1] Upon review of the pleadings and applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6), and that Defendants' motion will be granted in part and denied in part.

I. BACKGROUND

Plaintiff Marianne Sawicki is a former Associate Professor in Defendant Morgan State University's ("MSU") Department of Philosophy and Religious Studies (the "Department"). Sawicki was denied tenure and terminated from her teaching position at MSU effective June 2003. She is suing the State of Maryland (the "State"), MSU, its President (Earl Richardson), Vice President for Academic Affairs (Clara Adams), Dean of the College of Liberal Arts (Burney Hollis), and Department Chair (Otto Begus) (collectively, the "Individual Defendants") for race, gender,

[1] Also pending is Plaintiff's Motion for Leave to File Supplemental Opposition. Paper No. 26. Because the Supplemental Opposition responds directly and briefly to the material presented in Defendants' Reply in Support of their Motion to Dismiss, the Court will grant Plaintiff's motion and accept the pleading as filed.

disability and age discrimination, as well as sexual harassment, retaliation, breach of contract, wrongful termination of employment, and injunctive relief. The factual allegations included in the Complaint to support these claims are as follows.

Sawicki, a 53 year old white female, was hired by MSU, a historically black institution, on March 28, 2000. She alleges that her Department Chair, Otto Begus, has made it a priority to recruit and retain black professors while systematically holding back Sawicki's professional development so that she would not achieve tenure. In comparison to a similarly situated African (Eritrean) male colleague, Sawicki was assigned a heavier teaching load, received less time for research, and was warned not to develop extra-curricular contact with students.

When Sawicki was regularly harassed and heckled by students during the spring semester of 2001, Begus refused to provide any support and instead berated her as having an attitude of superiority and condescension; thinking that she was "a superior white woman" who had come to MSU to teach "ignorant black people." Complaint at ¶¶ 30-31. Begus also publicly reprimanded and criticized Sawicki at a Departmental social gathering later that semester. He discontinued conducting student evaluations of Sawicki when the results were consistently high, and neglected to conduct her required regular supervisory evaluations. When Sawicki applied for tenure in the fall of 2001, Begus recommended her for deferral due to his doubts regarding Sawicki's ability to relate to black students, despite the favorable ratings she had received from her students.

During the spring semester of 2002, Sawicki alleges a lack of support from Dean Hollis and Begus, among others, when she reported physical intimidation and a racial slur made against her by a black male student. She alleges similar inappropriate responses to her reports concerning two incidents, occurring that same semester, in which male students submitted violent pornographic images to her in online assignments. After receiving no reply to several letters sent to Hollis concerning these incidents, Sawicki learned from Begus that the incidents would count against her in her re-application for tenure in the fall of 2002. She again wrote letters to Hollis concerning this action threatened by Begus. Subsequently, Hollis falsified records in an attempt to make it appear that he had responded to Sawicki's correspondence in a timely manner.

Sawicki also alleges a lack of reasonable accommodations to her teaching schedule throughout the 2002-03 school year to compensate for the partial paralysis of her right leg, due to a 1988 spinal injury, and her Hashimoto's thyroiditis. Her partial paralysis makes Sawicki more likely to trip and fall, and unable to stand for long periods of time without pain. Sawicki's thyroiditis is regulated through diet, and requires that she be allowed sufficient breaks between classes for meals. Despite her request for accommodations, Sawicki was assigned a class load more extreme than other professors, including twelve hour days with five hour lecture assignments that did not allow her to break for meals nor enable her to physically transport necessary equipment from classroom to classroom.

Finally, Sawicki alleges a host of procedural irregularities in her tenure review process and her communications concerning same over the course of the summer and

fall of 2002. These communications with President Richardson, Vice President Adams, Hollis, and Begus, ultimately resulted in MSU setting June 30, 2003, as the termination date for her employment. On February 27, 2003, Sawicki filed a complaint with the EEOC; she later received a right to sue letter on March 5, 2003. This nine count suit was filed on June 2, 2003, pursuant to 42 U.S.C. § 1981, Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and Maryland common law. Defendants now move for dismissal of the entire complaint on a variety of grounds.

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conley v. Gibson,,* 355 U.S. 41, 45-46 (1957). In considering Defendants' Motion to Dismiss, the Court "must accept the factual allegations of the complaint as true and must view the complaint in the light most favorable to the plaintiff." *GE Inv. Private Placement Partners II v. Parker,* 247 F.3d 543, 548 (4th Cir. 2001) (citation omitted). Where the matter before the Court involves "a civil rights complaint, [the Court] must be especially solicitous of the wrongs alleged and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." *Edwards v. City of Goldsboro,* 178 F.3d 231, 244 (4th Cir. 1999) (internal quotations omitted).

III. DISCUSSION

As a preliminary matter, Defendants claim that it is impossible to discern under which statutes Sawicki seeks relief due to her failure to include a specific statutory reference in each count of her complaint. Defendants nevertheless are able to make cogent arguments concerning each of the counts, most of which obviously relate to one or more of the statutes cited in ¶ 2 of Sawicki's Amended Complaint. The only counts for which there could be legitimate confusion, and for which Defendants' seek dismissal without prejudice, are counts I and II (concerning gender and race discrimination). Sawicki clarifies in her Opposition that she seeks relief under both 42 U.S.C. § 1981 and Title VII for counts I and II, in addition to pointing out that the elements of proof are the same under each statutory cause of action. *See Warren v. Halstead Indus., Inc.,* 802 F.2d 746, 754 (4th Cir. 1986), Accordingly, the Court will not grant dismissal of any count for failure to set forth its statutory basis.

A. Eleventh Amendment Immunity

Defendants argue that pursuant to the Eleventh Amendment, Counts IV (disability discrimination), V (age discrimination), VII (Breach of Contract), VIII (Wrongful Termination), and IX (Injunctive Relief) should be dismissed as to the State, MSU, and the Individual Defendants, insofar as they are sued in their official capacities. The Eleventh Amendment provides that states cannot be sued in federal court without their consent. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 54 (1996). As "an arm of the State," MSU enjoys the protection of this immunity as well. *See* Md. Ann. Code, Educ. § 14-101 (2001) (establishing MSU as "the State's public urban university with a

mission of instruction, research, and service."); *Palotai v. Univ. of Md. Coll. Park,* 959 F. Supp. 714, 716 (D. Md. 1997) (holding that, as a state agency, the University of Maryland is protected by Eleventh Amendment Immunity (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 280 (1997)). Furthermore, because a "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office," such officials fall under the aegis of the Eleventh Amendment as well; a suit against officials acting in their official capacity "is no different from a suit against the State itself." *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71 (1988).

This sovereign immunity, however, may be waived; states may exercise their own discretion and waive their immunity, or Congress may design a law that specifically abrogates states' protection. To determine when Congress intended a federal statute to supercede this sovereign immunity, courts must determine "first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power." *Seminole Tribe,* 517 U.S. at 55. The Supreme Court has explained "that Congress may, in determining what is appropriate legislation for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976) (internal quotation marks omitted). As Defendants implicitly concede, Congress validly abrogated the Eleventh Amendment immunity of the states as to claims under Title VII, making those claims by Sawicki in

Counts I, II, III, and VI impervious to attack on Eleventh Amendment grounds. *See Fitzpatrick* at 452-53.[2]

1. Age and Disability Discrimination Claims

Several of Sawicki's claims, however, are subject to sovereign immunity protection. Sawicki's claim in Count V that Defendants violated the Age Discrimination in Employment Act ("ADEA"), is barred by sovereign immunity, insofar as it is brought against the State, MSU, or the Individual Defendants in their official capacities. *Kimel v. Florida Board of Regents,* 528 U.S. 62, 74 (2000). Sawicki's claim of disability discrimination under the Americans with Disabilities Act ("ADA"), against the same list of defendants in Count IV is also barred by sovereign immunity pursuant to decisions of the Supreme Court and the Fourth Circuit. *See Board of Trustees of the Univ. of Alabama v. Garrett,* 531 U.S. 356 (2001) (holding that Title I of the ADA, the statute's employment discrimination provisions, did not abrogate the States' sovereign immunity); *Wessel v. Glendening,* 306 F.3d 203, 215 (4th Cir. 2002) (concluding that Title II of the ADA was not a valid exercise of Congress's power to abrogate states' sovereign immunity). Although Sawicki points out that the Supreme Court currently has pending before it a case to resolve the split in circuits concerning the validity of Congress's

[2] To the extent that the claims in Counts I and II (against MSU, the State, and the Individual Defendants in their official capacities) are also based on 42 U.S.C. § 1981, however, they are barred by Eleventh Amendment immunity. *Persaud v. Morgan State University,* 34 F.3d 1066, 1994 WL 446797, *1 (4th Cir. 1994) ("The district court properly found that the Eleventh Amendment bars Appellant's 42 U.S.C. §§ 1981, 1983 claims and his breach of contract claim against the university.").

attempt to abrogate state immunity through Title II, this Court is compelled to follow the existing law of the Fourth Circuit and order dismissal.

2. Maryland Common Law Claims

Defendants next argue that Sawicki's claims based on Maryland common law in Count VII (Breach of Contract) and Count VIII (Wrongful Termination) are also barred by the Eleventh Amendment. Although Sawicki's Amended Complaint alleges compliance with the procedures of the Maryland Tort Claims Act, Defendants argue that the waivers of sovereign immunity in the Maryland code for tort and contract claims are limited to suits brought in state, not federal, courts. *See* Md. Code Ann., State Gov't §§ 12-104, 201 (waiving immunity to actions "in a court of the State"); *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 241 (1985) (concluding that a state's waiver of immunity from suit in state court "is not enough to waive the immunity guaranteed by the Eleventh Amendment" for federal court jurisdiction). In her Opposition, Sawicki does not dispute this legal argument, but instead asks that the Counts be dismissed without prejudice to allow them to be filed in State court. Since the Defendants make no challenge as to the sufficiency of the breach of contract and wrongful termination claims, they will be dismissed without prejudice.

3. Injunctive Relief

Defendants argue that Count IX, which seeks reinstatement of Sawicki as an MSU professor and a grant of tenure, without stating a cause of action for the relief requested, should likewise be dismissed on Eleventh

Amendment grounds. Were this a properly plead cause of action, it would still be dismissed as to MSU and the State because "the relief sought by a plaintiff suing a State is irrelevant to the question of whether the suit is barred by the Eleventh Amendment." *Seminole Tribe v. Florida,* 517 U.S. 44, 58 (1996). Sawicki contends in opposition, however, that the count should not be dismissed as an action against the individual defendants in their official capacities pursuant to the *Ex parte Young* exception for ongoing violations of federal law that can only be cured by prospective relief, *Kentucky v. Graham,* 473 U.S. 159, 167 n.14 (1985) (citing *Ex parte Young,* 209 U.S. 123 (1908)).

In acknowledgment that the exception "does not apply when the alleged violation of federal law occurred entirely in the past[,]" *DeBauche v. Trani,* 191 F.3d 499, 505 (4th Cir. 1999), Sawicki cites to page 15 of her Amended Complaint as evidence that she explicitly alleged a continuing violation. Despite Sawicki's arguments to the contrary, the cited page admits that the alleged continuing violations "culminat[ed] in the wrongful termination of her employment on June 10, 2003[.]" Compl. at ¶ 53. The Court concludes that Sawicki's bare assertions that a continuing scheme exists to deny her of her civil rights is not enough to bring her extraordinary request of injunctive relief[3] within the *Ex parte Young* exception because "[m]ere conjecture is insufficient to transform a one-time event into a continuing governmental practice or an ongoing

[3] The Court notes that Sawicki's request, to be reinstated as an MSU professor despite the expiration of her contract term, and to be granted tenure, would put her in a better position than she enjoyed at any point during her employment at MSU.

violation." *DeBauche,* 191 F.3d at 505. Accordingly, Count IX will be dismissed in its entirety.

B. Liability of Individual Defendants

Defendant argues that the claims against the Individual Defendants in their personal capacities should be dismissed from Counts I (race discrimination), II (gender discrimination), III (sexual harassment), and VI (retaliation) since Title VII, the basis for the aforementioned counts, provides no cause of action against employees as individuals. *Lissau v. Southern Food Service, Inc.,* 159 F.3d 177, 180-81 (4th Cir. 1998). The Fourth Circuit has held that the ADEA also limits liability to the employer, rather than individual employees, and so Defendants assert that dismissal of the Individual Defendants is likewise warranted as to Count V (age discrimination). *Birkbeck v. Marvel Lighting Corp.,* 30 F.3d 507, 510-11 (4th Cir. 1994). Finally, since the ADA's definition of employer is similar to that found in both Title VII and the ADEA, Defendants argue that this Court should dismiss Count IV (disability discrimination) against the Individual Defendants, in keeping with other circuits which have considered the issue. *See, e.g., Hunt v. District of Columbia,* 2002 WL 1997987 (D.C. Cir. 2002).

Sawicki does not appear to contest most of these arguments as to individual liability, instead choosing to focus her counter arguments on whether each of the above mentioned statutes creates the possibility of suits against the Individual Defendants in their official capacities. As explained in Part A, *supra,* Sawicki's argument is inapposite as to Counts IV and V because those claims are barred by Eleventh Amendment Immunity. As to Counts I-III and

VI, Defendants, in their Reply, do not dispute that Title VII allows for official capacity actions against individuals, but instead contest whether Sawicki's EEOC complaint ran afoul of Title VII's naming requirement by failing to specifically list the Individual Defendants. 42 U.S.C. § 2000e-5(f)(1). In her Surreply, Sawicki contradicts this assertion by referencing the hundreds of pages of documentation filed with the EEOC that described the discrimination she experienced at the hands of each of the individual defendants. Without wading into this potential quagmire of exhibits at the motion to dismiss stage, the Court simply notes that any remaining official capacity claims would be redundant of Sawicki's already asserted claims against the university and state itself, and so will be dismissed in an effort to streamline the proceedings. The personal capacity claims against the Individual Defendants based on Title VII, the ADA or the ADEA will also be dismissed.

The only remaining argument concerning the Individual Defendants in their personal capacities is whether Sawicki may amend her complaint to assert her § 1981 claims in an action formally brought under § 1983. Sawicki admits that under current Fourth Circuit law, a § 1983 action is the "exclusive federal remedy for violation of the rights guaranteed in § 1981." *Dennis v. County of Fairfax,* 55 F.3d 151, 156 (4th Cir. 1995) (quoting *Jett v. Dallas Indep. School Dist.,* 491 U.S. 701 (1989)). Yet, as of now, Sawicki has not officially plead 42 U.S.C. § 1983 as a basis for recovering monetary damages against the Individual Defendants. Accordingly, the claims, as currently plead, against the Individual Defendants in Counts I and II based on § 1981 will be dismissed. Sawicki will,

however, be granted leave to amend her complaint to properly plead these counts under 42 U.S.C. § 1983.

C. Sexual Harassment

Defendants challenge Count III as alleging insufficient facts to state the required elements of Sawicki's claim of sexual harassment. In evaluating this argument, the Court is mindful of the Supreme Court's guidance that an employment discrimination plaintiff need not plead sufficient facts for a prima facie case of discrimination to survive a motion to dismiss. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 510-11 (2002). The Fourth Circuit has subsequently clarified, however, that a hostile work environment plaintiff's complaint must still allege facts which, liberally construed, are "sufficient to state the elements of her claims." *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003), *cert. denied*, 124 S.Ct. 301 (2003); *Cf. Cockerham ex rel Cockerham v. Stokes County Bd of Educ.*, 2004 WL 237754, at *4 (M.D.N.C. Feb. 3, 2004) (acknowledging the tension between the holdings of *Swierkiewicz* and *Bass*). In light of this potentially contradictory instruction, this Court is constrained by its Court of Appeals to evaluate whether Sawicki has sufficiently alleged that: "(1) she experienced unwelcome harassment; (2) the harassment was based on her gender . . . ; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer." *Bass*, 324 F.3d at 765.

Construing the facts alleged in the light most favorable to Sawicki, the Court readily concludes that both the pornography submitted to her by male students, and the

callous and insufficient responses to her complaints by male colleagues, could be manifestations of harassment based on Sawicki's gender. As is evidenced by the many cases cited on pages 20 and 21 of Sawicki's Opposition, exposure to pornography in the workplace, whether or not specifically targeting a plaintiff, is a classic facet of sexual harassment case law. Sawicki's complaint specifically alleges a failure by her male colleagues to respond to multiple written communications regarding her exposure to pornographic images of "young black men engaged in violent acts against mature white women[,]" that she found offensive and threatening. Compl. at ¶¶ 63-64. Thus, Sawicki alleges facts fulfilling the first two elements of her claim of sexual harassment; that the harassment was unwelcome and based on her gender.

Whether Sawicki's complaint satisfies the third element, that the harassment was so severe or pervasive as to alter her conditions of employment, is a closer question. While Sawicki may not ultimately establish this element, the Court cannot agree with Defendants' contention that MSU's response to Sawicki's complaints is irrelevant to the severity or pervasiveness element of her claim. Considering all of the circumstances in this instance requires the Court to take into account the alleged facts that incidents which Sawicki found offensive and threatening were not treated as serious by MSU. Not only could Sawicki not rely on her concerns being promptly investigated, or even acknowledged, but she was told that voicing those concerns would count against her at the crucial juncture when she would be reviewed for tenure. The Court can only surmise that MSU's own administration recognized the potential inappropriateness of their non-response by Dean Hollis's alleged falsification of

records to make it appear as if he had responded to Sawicki's correspondence in a timely manner.

Additionally, in Exhibit 6 of Sawicki's Complaint, she alleges multiple additional instances which could arguably have contributed to her hostile work environment, including threats by students and on-campus vandalism of her car. That same exhibit, a copy of her formal complaint of sexual harassment, also describes touching by students and staff which occurred subsequent to the pornography submissions and their aftermath. Sawicki alleges that she perceived this spontaneous hugging as aggressive at the moment of occurrence. That she later recognized that the students involved likely had no improper intentions may support the argument that these incidents were not severe in and of themselves, but the Court concludes that this evidence of Sawicki's altered perceptions points toward the triggering events as being significant enough to have altered her employment conditions and created a hostile environment. At least at this stage, Sawicki has alleged sufficient facts to meet the third element of her claim.

The Court concludes that Sawicki has also alleged sufficient facts to meet the final element of her claim, that some basis exists for imputing liability to MSU. As discussed above, Sawicki's complaint focuses on MSU's inaction and then hostile reaction in the face of her efforts to request support for the initial harassing incidents. Defendants argue that the Court should evaluate this element under a negligence theory for non-supervisor harassment. Assuming arguendo that they are correct, and it is by no means clear that they are, Sawicki's Complaint at Exhibit 6 alleges a physical threat against her person by one of the harassing students made after her initial communications to Hollis were ignored. This is enough to

raise the specter of an inadequate employer response that facilitated further acts of harassment. Accordingly, Sawicki has sufficiently plead this and every other element of her claim of sexual harassment to survive Defendants' motion to dismiss.

D. Retaliation

Sawicki alleges in Count VI of her complaint that her employment with MSU was wrongfully terminated in retaliation for her attempts "to utilize the policies and procedures in place at MSU dealing with her tenure review (see Count VII), the accommodations required for her physical disability as described in Count IV above, and her claim of sexual harassment, against university administrators[.]" Complaint at ¶ 112. As discussed in Part A, *supra,* Sawicki's claims in Counts IV and VII are barred by sovereign immunity. Thus, Sawicki's cause of action for retaliation, if it exists, falls under Title VII.

To establish the elements of a claim for retaliation under Title VII, Sawicki must allege facts sufficient to state that: "1) she engaged in protected activity; 2) the employer took an adverse employment action against her; and 3) a causal relationship existed between the protected activity and the asserted adverse action." *Von Gunten v. Maryland,* 243 F.3d 858, 863 (4th Cir. 2001). The adverse action that Sawicki alleges that she suffered is the termination of her employment, which would clearly meet prong two. Assuming that prong one is met by her reporting of sexual harassment, the Court nonetheless finds her allegations under the third prong (causation) to be deficient.

Sawicki alleges that in retaliation for her letters in September of 2002 to Dean Hollis, written in an attempt to prevent Dr. Begus from retaliating against her concerning her students' submission of pornography, President Richardson "immediately notified Dr. Sawicki that her employment would terminate in June 2003 and he withdrew his June 28, 2002 deferral of her tenure decision." Complaint at ¶¶ 66, 67. The glaring problem with this allegation is that Richardson's June 28, 2002, letter contained an unambiguous offer of a deferral *if it was accepted by Sawicki within 10 days.* Pl's. Exh. 16. The letter further stated that not accepting the terms of the offer would result in a determination that Sawicki had not met the criteria for tenure and that her employment would terminate on June 30, 2003. *Id.* Sawicki does not dispute this interpretation of the letter as evidenced by her statement in ¶ 116 of her Complaint that her termination was "first noted by way of a letter from Dr. Richardson dated June 28, 2002[.]" Nor does Sawicki assert that she did in fact accept the letter's offer before it expired.

Thus, the decision to terminate Sawicki was effectively made months prior to her allegations of protected conduct. Richardson's letter of September 18, 2002, which confirmed her termination date subsequent to Sawicki's letters to Hollis (but still prior to her formal complaint of sexual harassment that was not filed until October 30, 2002) could not have withdrawn the deferral offer because there was nothing to withdraw. Since the complaint nowhere alleges that the June 28, 2002, letter was the consequence of protected activity by Sawicki, it fails to sufficiently allege that "a causal relationship existed between the protected activity and the asserted adverse

action." *Von Gunten,* 243 F.3d at 863. Accordingly, Sawicki's claim of retaliation will be dismissed.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss will be granted in part and denied in part. Counts IV, V, VI, and IX will be dismissed in their entirety. Counts VII and VIII will likewise be dismissed in their entirety, but without prejudice to allow Sawicki to refile them in state court. Counts I, II, and III will be dismissed as to the Individual Defendants, in their official and personal capacities, insofar as they are based on Title VII. Counts I and II will also be dismissed against the Individual Defendants insofar as they are based on § 1981, but without prejudice to allow Sawicki to amend her complaint to include § 1983. The Motion to Dismiss Counts I, II, and III against MSU and the State will be denied. An order consistent with this memorandum will issue.

/s/
William M. Nickerson
Senior United States
District Judge

Dated: March 15, 2004.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARIANNE SAWICKI,	:	
v.	:	Civil Action:
	:	WMN-03-1600
MORGAN STATE UNIVERSITY, *et al.*	:	

ORDER

Pursuant to the foregoing memorandum, and for the reasons stated therein, IT IS this 15th day of March, 2004, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Defendants' Motion to Dismiss (Paper No. 19) is hereby GRANTED in part and DENIED in part, in that it is:

a. GRANTED as to Counts IV, V, VI and IX,

b. GRANTED as to Counts VII and VIII, but dismissed without prejudice,

c. GRANTED as to the Individual Defendants in Counts I, II, and III, insofar as the claims are based on Title VII,

d. GRANTED as to the Individual Defendants in Counts I and II insofar as the claims are based on § 1981, but dismissed without prejudice, and

e. DENIED as to all remaining Counts;

2. That Plaintiff's Motion For Leave to File a Surreply in Opposition to Defendants' Motion to Dismiss (Paper No. 26) is hereby GRANTED; and

3. That the Clerk of the Court shall mail or transmit copies of the foregoing memorandum and this order to all counsel of record.

/s/
William M. Nickerson
Senior United States
District Judge